No. 700

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

C. K. KING, as Administrator of the Estate of J. W. Smith, deceased,
Plaintiff in Error,

vs.

CHARLES H. SMITH and THE CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY, a corporation,
Defendants in Error.

POINTS AND AUTHORITIES

for Charles H. Smith, Defendant in Error, on Motion to Dismiss and Motion to Affirm,

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Practice of uniting motions.

The practice of uniting with a motion to dismiss a motion to affirm on the ground that although the record may show jurisdiction, it is manifest the writ was taken for delay only, is authorized by the Supreme

Court of the United States, Rule VI, Paragraph V and adopted by Rule VIII of this Court as follows:

> "The practice shall be the same as in the Supreme Court of the United States as far as the same shall be applicable."

Foster recognizes this practice in the Supreme Court and digests the authorities upon it.

2 Foster, Sec. 489 p. 1067;

Where it appears *even before the hearing* that the writ of error or appeal is clearly frivolous, motion to affirm will be granted.

Chanute City v. *Trader*, 132 U. S. 210;
Sugg v. *Thornton*, 132 U. S. 524.

The case of *Chanute City* v. *Trader*, *supra*, reviews and renders it unnecessary to examine previous cases.

In this case the Court says:

> "In the present case there does not appear to be any ground for contending that this Court has no jurisdiction, yet we are entirely satisfied that the reasons assigned for taking the writ of error are entirely frivolous and that it was taken for delay only", and the motion to affirm was granted.

In the *Tryon case* 105 U. S. 267, the Court says:

> "The motion to dismiss must therefore be overruled, but on looking into the record, we are satisfied the appeal was taken for delay." Motion to affirm granted.

In *Swope* v. *Leffingwell*, 105 U. S. 3:

> "We have jurisdiction of this case. The motion to dismiss is therefore denied, but * * * the motion to affirm is granted."

In *Hinckley* v. *Morton*, 103 U. S. 764:

> "Our jurisdiction of this case is clear. The motion to dismiss is therefore denied, but we think the motion to affirm should be granted."

In *Micas* v. *Williams*, 104 U. S. 556:

> "There was, on the record, *as it stood when* these motions were made, at least sufficient color of right to a dismissal, to justify us in entertaining with it a motion to affirm in accordance with the provisions of Rule VI, par. V. Motion to affirm granted."

In *The Alaska*, 103 U. S. 201:

> "There is sufficient color on the motion to dismiss to warrant us in entertaining the motion to affirm. Judgment affirmed."

In *Evans* v. *Brown*, 109 U. S. 180, motion to dismiss denied:

> "But on looking into the record we find the case was manifestly brought here for delay only. All the questions presented are so frivolous as not to need further argument."

A motion to dismiss a writ of error on appeal may be made at any time *even before the term* to which the return should be made.

2 Foster, Sec. 489, p. 1067;
Ex parte Russell, 13 Wall. 664;
Clarke v. *Hancock*, 94 U. S. 493;
Thomas v. *Wooldridge*, 23 Wall. 283.

In *Clark* v. *Hancock*, *supra*, the Court says:

> "It is insisted that a motion to dismiss cannot be entertained until the return day of the writ. Such was the old practice, but in *ex parte Russell*,

13 Wall. 671, and *Thomas* v. *Wooldridge*, 23 *id.* 288, the rule was changed. It seemed to us then that such a change would be likely to prevent great delays and expense and further the ends of justice. Subsequent experience confirms that opinion. In the present crowded state of our docket it becomes us to be especially careful that our jurisdiction is not invoked *for delay merely*, and when the record is presented in such a form that we can, without too great inconvenience, inform ourselves of the question to be decided, we shall be inclined to receive applications of this kind. In the present case we have a printed record and it is evident that we have no jurisdiction." Motion granted.

The syllabus of *Thomas* v. *Wooldridge*, *supra*, reads:

> " If the record be printed and the rules of the court about motions of that sort be complied with by the party making the motion, the motion will be entertained and granted."

Motion to Affirm.

We insist that the appeal was taken solely for delay and to prevent a speedy sale of the railroad and a reorganization which could not be effected while the ownership of the bonds was in doubt, for the ownership of the bonds is the ownership of the railroad.

I.

The point made by appellant cannot be investigated:

I. The question involved is a matter of fact, which this Court has no power to review.

II. Any matter of law considered in reaching the fact found cannot be reviewed; where the finding states a mixed question of law and fact, the record should show a separate statement of the matter of law and exception thereto.

III. No matter of law is so excepted to as to be reviewable upon this record, save that the findings do not support the judgment.

IV. If this Court had jurisdiction to review the facts and had a record before it properly presenting the alleged error of law the judgment would be affirmed.

As to the power of this Court to review the errors assigned, upon the fact of ownership of bonds.

"Ownership" is an ultimate fact, dependent upon various probative facts. They in turn are dependent upon the evidence. "Ownership" in the present case of C. H. Smith depends upon the existence or non-existence of a gift—and appellant's argument is—see his brief, 17–18:

" 1. Aside from the confidential relation, the evi-
" dence is insufficient to establish an oral gift.

" 2. The existence of a confidential relation and the
" suspicious facts appearing in the record raise a pre-
" sumption of the illegality of the gift which the evi-
" dence is not sufficiently clear and strong to over-
" come."

Counsel then proceeds through the remainder of the

brief to argue that the evidence is not sufficient to sustain the finding of fact as to *ownership* because the evidence does not establish a legal gift.

In other words, he is making to the Circuit Court of Appeals the argument properly addressable to a jury on the question whether Charles H. Smith or the estate of J. W. Smith was the true owner of these bonds.

This argument is not presentable here because it is an argument upon the sufficiency of the evidence to establish a fact. Hereafter we will examine this evidence, but our first proposition is that the matters excepted to and argued are matters of fact and not reviewable here. The only point presentable is, do the *facts* as found—not in the opinion—but *in the findings* warrant the conclusion of law, and the judgment. This point is debatable, but is not debated by appellant for the reason, that if the findings of fact are correct the conclusion of law and the judgment irresistibly follow.

That this Court cannot review the fact of ownership is apparent. The 7th amendment to the Constitution of the United States provides:

"No fact tried by a jury" (and the finding of a Court "shall have the same effect as the verdict of a jury", R. S. §649) shall be otherwise re-examined in any court of the United States than according to the rules of the common law, "that is, according to the Supreme "Court, by a new trial in the court below or by the "award of a *venire de novo* by an appellate court for

" some *error of law* which intervened in the proceed-
" ings". *Miller* v. *Ins. Co.*, 12 Wall. 285, 300, 301.

The Act of Congress provides that there shall be no reversal in a United States appellate court, upon a writ of error, "for any error in fact", R. S. §1011. The Constitution and the Acts of Congress, viz.: the 7th amendment and R. S. §§649, 700 and 1011, cover the ground and govern this case. In the clause of §700 R. S. which reads: "And when the finding is special the " review *may extend* to the determination of the suffi-
" ciency of the facts found to support the judgment", the words "may extend to" are construed to mean "*must extend no further*".

Jennison v. *Leonard*, 21 Wall. 302, 307.

A bill of exceptions cannot be used as is done in this case, to bring up the whole testimony for review.

Simmons v. *Wagner*, 101 U. S. 260, 261;
Dirst v. *Monio*, 14 Wall. 484, 490;
Coddington v. *Richardson*, 10 Wall. 516, 518;
Hausskuscht v. *Claypool*, 1 Blk. 435;
Johnston v. *Jones*, 1 Blk. 220.

The appellate court cannot review the findings of fact by the court. They are as conclusive as the verdict of a jury. *Walnut* v. *Wade*, 103 U. S. 683, 688; *Craig* v. *Mo.*, 4 Pet. 410, 427; *Ins. Co.* v. *Sea*, 21 Wall. 158.

It is irregular and improper to embody all the evidence in the bill of exceptions where no part of it has been excepted to. *Pennock* v. *Dialogue*, 2 Pet. 15:

"We have often held that the Act of 1865 (R. S. §§649, 700) does not permit us to consider the effect of evidence in the case, but only to determine whether the facts found at the trial below are sufficient to support the judgment. * * * Among the objections included in the general exception are many relating to the *sufficiency of the evidence to support the findings*. These cannot be examined here, etc."

Boogher v. *Ins. Co.*, 103 U. S. 90-98.

A finding upon a conclusion of law pure and simple is not conclusive (*French* v. *Edwards*, 21 Wall. 151, a case in which the conclusion of law did not follow from the premises of facts found). But

Findings of mixed law and fact cannot be disturbed.

"In ordering judgment for the plaintiff, certain propositions of law are announced by the Judge as having been held by him. These are important only as they affect the question whether the facts found are sufficient to support the judgment. * * No specific exception is or can be taken to them."

Jennison v. *Leonard*, 21 Wall. 302, 307, *supra*.

"It" (a certain finding) "is not open here to inquiry. And as it seems, from its very nature, to be *a mixed question of law and fact* which would be concluded by the verdict of a jury, it must be equally conclusive here."

Bridge Co. v. *Kan. Pac. Ry. Co.*, 92 U.S. 315, 318.

"Questions of fact will not be re-examined by this Court in common law actions * * as it belongs to the Circuit Court to find the facts, and, in order to do that, *it must weigh the evidence and draw the inferences of fact from the whole evidence given in the case*."

Crews v. *Brewor*, 19 Wall. 70, 72.

"The appellate court has no authority upon a writ of error to revise the evidence given in the court below to ascertain whether the judge who tried the case without the intervention of a jury rightly interpreted the evidence or drew correct conclusions from it. This is the province of the judge, etc."

Hyde v. *Booraem*, 16 Pet. 169, 176.

Where the Circuit Court decides *both the law and the questions of fact*, no exceptions can regularly be taken.

U. S. v. *King*, 7 How. 833, 853;
Cooper v. *Omohundro*, 19 Wall. 65, 70;
Bond v. *Brown*, 12 How. 254;
Flanders v. *Tweed*, 9 Wall. 425;
The Abbotsford (Ad'y), 98 U. S. 440.

"Neither party is entitled to a bill of exceptions as to any special finding of the court, for the plain reason that the special finding of the Circuit Court in such a case is not a proper subject of exception nor of review in the Supreme Court."

Tyng v. *Grinnell*, 92 U. S. 467, 471.

If there is a special finding the evidence will not be examined to see whether the finding is right.

Sault v. *Shepherd*, 4 Wall. 502, 507;
Copelin v. *Ins. Co.*, 9 Wall. 461, 467;
Ins. Co. v. *Folsom*, 18 Wall. 237, 253;
U. S. v. *Dawson*, 101 U. S. 569;
Cucullu v. *Emmerling*, 22 How. 83.

"Only exceptions taken at the trial to the ruling of the law by the judge and to the admission or rejection of evidence can be inspected. Beyond this the appellate court has no power to look into a bill on a writ of error, as it is a creature of the

statute restricted to the points stated."

Zeller v. *Eckert*, 4 How. 297;
Phillips v. *Preston*, 5 How. 489.

"A bill of exceptions should only present the rulings of the court upon some matter of law, as upon the admission or exclusion of evidence, and should contain only so much of the testimony as may be necessary to explain the bearing of the rulings on the issues involved."

Lincoln v. *Claflin*, 7 Wall. 136.

In this bill of exceptions there are no exceptions to any rulings of the Court in the progress of the trial, to the admission or exclusion of evidence. The exceptions are only to the Court's findings of fact and conclusions of law and to the judgment.

Record, pp. 176–179;
Assignments of Error, p. 183.

That appellate courts are only concerned with matters of law is illustrated in Rule 10 of this Court. Matters of fact have nothing to do with a case in an appellate court.

In a recent case *of trespass* to try title which resolved itself at last into a question of surveys and boundaries, says the Circuit Court of Appeals of the Fifth Circuit:

"If there was anything in the evidence with regard to lines or fences" (in this case it would be in regard to gift or delivery) "or other matters which tended to render the verdict vague and uncertain" (the findings untrue or insufficient), "*it is a matter wholly beyond our inquiry and* could only have

been dealt with by the trial court on a motion for a new trial."

Cochran v. *Schreiber*, 107 Fed. 371, 375.

And this notwithstanding that the decision of a motion for a new trial is not reviewable in United States Courts.

What should plaintiff in error have done to obtain a review of the questions which he now seeks to have reviewed? The Supreme Court answers this question. In a case where a trial by jury has been dispensed with and the court tries both the law and the facts, to enable the appellate court to re-examine the point or points of law involved, the counsel, after the close of the evidence, should present the propositions of law (e. g. in case at bar what constitutes a valid gift), which it is claimed should govern the decision, and the Court should state the rulings thereon, or in coming to its determination, and so much evidence and no more should be incorporated in the bill of exceptions as was deemed necessary to present the points of law determined against the party bringing the writ.

Arthurs v. *Hart*, 17 How. 15;
Norris v. *Jackson*, 9 Wall. 125, 128;

and other cases.

Under the law announced by this Court, at the argument—that it could not review findings that were supported by any evidence, or that depended upon conflicting evidence—are we not clearly entitled to an affirm-

ance of the judgment of the Court below?

Not only does the special finding herein support the judgment, but the evidence, if it can be looked into, abundantly supports the finding. We thought to have saved the Court the examination of the evidence, but we are better satisfied and feel safer about our case as it is.

In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, *shall be awarded* upon the amount of the judgment.

2nd par. Rule 23 *Supreme Court*;
2nd par. Rule 30 *Circuit Court of Appeals Ninth Circuit*.

What says the Act of Congress?

> "Where, upon a writ of error, judgment is affirmed * * the court shall adjudge to the respondent in error just damages for his delay, and single or double costs at its discretion" R. S. §1010.

The authorities under this law and this rule are numerous, and all our way.

Barrow v. *Hill*, 13 How. 54;
Kilbourne v. *St. Sav. Inst.*, 22 How. 503;
Sutton v. *Bancroft*, 23 How. 320;
Jenkins v. *Banning*, *id.*, 455;
Prentice v. *Peckersgill*, 6 Wall. 511;
Campbell v. *Wilcox*, 10 Wall. 421;
Ins. Co. v. *Huchbergers*, 12 Wall. 164;

Hermessy v. *Sheldon*, *id.*, 440;
Pennywit v. *Eaton*, 15 Wall. 380, 382;
Hall v. *Jordan*, 19 Wall. 271;
R. R. Co. v. *Foley*, 94 U. S. 100;
Peyton v. *Heinckin*, 131 U. S. C. 1;
Sire v. *Brake Co.*, 137 U. S. 579 (on motion to dismiss and affirm);
Mining Co. v. *Starr*, 141 U. S. 222;
Micas v. *Williams*, 104 U. S. 556.

In *Amory* v. *Amory*, 91 U. S. 356 and *Whitney* v. *Cook*, 99 U. S. 607, the Court says that it will by the assessment of damages suppress the evil of resorting to its jurisdiction upon frivolous grounds, or "where it " finds that its jurisdiction has been invoked merely to " gain time".

Even if the evidence could be examined and the facts reviewed, the opinion of the Court below clearly shows the weakness of appellants' contention, and that there could have been no purpose in this proceeding but delay.

II.

On the merits.

The only point of appellant is, that no gift of the bonds was made by J. W. Smith to Charles H. Smith.

Long prior to this gift they had been placed in escrow by the deceased father of Charles H. Smith with Abner Doble, under an agreement with F. M. Smith,

whereby Doble was to deliver them to him upon payment of a certain amount of money. This option expired October 25th, 1895. Before that time no manual delivery was possible. The gift was made August 15th, 1895, delivery November 14th, 1895. J. W. Smith died November 15th, 1895. The Court in its opinion makes a very concise statement of the facts as established by the evidence as follows:

"There is no substantial conflict in the testimony in "the case. The only question is as to WHETHER IT "ESTABLISHES THE FACT that prior to his death J. W. "Smith gave the bonds in question to his son Charles "H. Smith, the plaintiff."

"The witness Abner Doble, referring to the receipt "for the bond dated San Francisco, November 14, "1895, executed by Charles H. Smith and signed 'J. "W. Smith by C. H. Smith', when asked 'How did "'you happen to deliver these bonds to Mr. Smith "'(referring to Charles H. Smith) upon *this receipt*' "replied 'I cannot remember distinctly, only I think, "'my impression is, that Captain J. W. Smith had "'told me that the bonds belonged to Charley Smith, "'and to give them to him'. In answer to the ques- "tion 'How long before this occurrence had you seen "J. W. Smith?' the witness replied: 'It had only been "'a short time. I was over there to see him a short "'time before he died'. Again, referring to a conver- "sation between the witness and J. W. Smith, the "witness said: 'My impression is he told me that the

" 'bonds belonged to Charley, and to deliver them to
" 'him. I think that is why I did so. I think that
" 'conversation was the groundwork of my delivering
" 'the bonds to his son'. The witness being asked if
" he remembered ever having received a written order
" from J. W. Smith, answered: 'I don't remember ever
" 'getting any direct order from him. I delivered
" 'them on account of what he told me, that they be-
" 'longed to his son; and when his son came for them,
" 'I delivered them'."

" This evidence, it seems to me, establishes the fact
" that Doble delivered the bonds to the plaintiff Charles
" H. Smith as his property, pursuant to the conversa-
" tion of the witness J. W. Smith. But aside from
" this declaration, there is other testimony to the effect
" that J. W. Smith had given these bonds to his son
" Charles H. Smith."

" The witness W. R. Thomas was the notary public
" who took the acknowledgments of J. W. Smith on the
" 14th of August, 1895, to certain deeds making con-
" veyances to the children of the grantor. He was
" asked to state whether or not at any time when he
" visited J. W. Smith the latter made any statement
" about the disposition of his property. The witness
" answered that J. W. Smith said that he had deeded
" away all of his property, so that in the event of his
" dying, there would be no trouble about his estate.
" The witness stated that prior to taking the acknow-
" ledgments to the deeds on August 14, 1895, Mr.

" Smith told him he was going to deed away all his " property before his death, and said to him, 'I want " 'you to make out a lot of deeds for me. I am going " 'to convey my property that way rather than make a " 'will, because there is always chance for litigation on " 'a will'. The witness says he seemed to be afraid " that there would be litigation if he made a will, and " proposed to distribute all his property before his " death."

" The witness C. K. King, administrator of the " estate, and one of the defendants in this action, testi- " fied that he heard J. W. Smith talk about the disposi- " tion of his property. He mentions one of these con- " versations as having occurred in the summer of 1895, " perhaps a month or two before J. W. Smith died, and " that he had told the witness that he had given the " property away to his children. The witness did not " know whether he said he had given all of it away, " but knew that he said most of it, and thought he said " that he had given his son C. H. Smith the railroad " property; that he stated that he had given the railroad " bonds to his son, and that this statement was made " about two months before he died."

" The witness G. W. Palmantier, an Oakland banker, " was acquainted with J. W. Smith in his lifetime. " Smith was a customer of the bank of which the wit- " ness was manager. Palmantier testified that he had " had conversations with J. W. Smith, in which the " disposition of his property was referred to. The wit-

" ness stated that he had called on Smith almost every
" day while he was sick, and they talked a great deal
" about the disposition of the property; that J. W. Smith
" told the witness that he did not own anything in the
" world; that he had disposed of everything; that he had
" turned over everything; that he had made deeds of
" his property to his daughters, and had turned over
" the bonds of the California & Nevada Railroad Com-
" pany to Charles H. Smith, his son. This witness
" appears to have had intimate relations with the de-
" ceased, and to have been familiar with his affairs.
" The deceased appears to have told the witness several
" times that he had disposed of his property. One of
" these conversations at least appears to have been after
" the execution of the deeds in August, 1895."

" From all the foregoing testimony it appears that
" it was the purpose of J. W. Smith to distribute his
" estate and give these bonds to the plaintiff, and that
" be stated before his death that he had made such dis-
" tribution. This testimony, coupled with the plain-
" tiff's possession of the bonds prior to his father's
" death, indicates very clearly that prior to the death of
" J. W. Smith the latter transferred the title and pos-
" session of the bonds to his son Charles H. Smith, the
" plaintiff in this case."

" The evidence on the other hand tending to show
" that these bonds really belonged to the estate of J. W.
" Smith, is found in the acts of ownership exercised by
" J. W. Smith during his lifetime, and in the character

" of the receipt executed by C. H. Smith on November
" 14th, 1895, when he withdrew the bonds from deposit
" with Abner Doble, and the further fact that C. H.
" Smith did not present to Doble the formal assignment
" of the bonds executed by his father on August 14,
" 1895, as the evidence of his right to their possession.
" the receipt executed by C. H. Smith shows that he
" was receiving the bonds of his father, J. W. Smith.
" But this circumstance is not conclusive. As the
" bonds were deposited by J. W. Smith, it was proper
" that Doble should require, as he did, that the receipt
" should be executed in the name of J. W. Smith."

* * * "It appears further that the relations be-
" tween the father and son were cordial and to some
" extent at least confidential. It was the son who, un-
" der the direction of his father, drew up the deeds exe-
" cuted on August 14, 1895, conveying property to the
" other children; and there does not appear to have been
" any reason why the father at that time should not
" have distributed to the son such share of the estate as
" he wished the son to receive; indeed, there would be
" cause for surprise, if, under the circumstances, this
" had not been done."

According to theory of plaintiff in error, the bonds alone, of all Smith's estate, were not given away.

This Court is not sitting as a jury.

The brief of plaintiffs in error is an argument to this Court sitting as a jury. This is illustrated as follows:

On page 8 he takes up the testimony of Abner Doble, a witness produced by the plaintiff in error, and argues that the testimony of this witness cannot be relied upon and that the Court erred in considering his testimony and thus in effect concedes that if the testimony is true the decision is correct. Again on page 9 he takes up the testimony of Mr. Palmantier, and argues as he might to a jury, why it cannot be relied upon by the Court. Again, on page 11 he treats the testimony of Mr. Thomas in the same manner. We find the plaintiff in error arguing to this Court that the Court cannot consider and rely upon the testimony of his own witnesses. The argument reaches its height on page 19 where plaintiff in error says: "The testimony " of Thomas, King, Palmantier and Doble was taken " between five and six years after J. W. Smith's death, " and doubtless neither of these gentlemen then had " cause to believe that they would be called upon to " state those conversations after the lapse of that time. " They do not attempt to state the exact language. In " the nature of things they could not. Mr Palmantier " states that J. W. Smith said that 'he calculated' that " his son 'would have' the bonds, or the railroad; again, " that he calculated that his son 'had' the bonds, 'or " 'that they were his, or they belonged to Charlie, or " 'that he had given them to him already'. Again, " that he had 'turned the bonds over', that 'he had " 'given them to him'. Again, 'I have given and " 'turned over my bonds to C. H. Smith' (trans. pp.

" 77–78). These statements are not only insufficient but " irreconcilable, and serve only to show how treacher- " ous is the human memory."

The plaintiff in error again referring to HIS OWN testimony says (brief 20):

" The rest of King's testimony is not definite and " certain, for while his deposition taken a few days be- " fore the trial he said the statement was that J. W. " Smith had given his son the 'railroad' on the trial he " changed the word to 'bonds'."

On page 20 counsel, again referring to the testimony of Doble, says: "It must be placed in the category of " slight evidence if worthy of notice at all". Speaking of all the evidence of these witnesses, counsel says: " This WEAK and UNSATISFACTORY evidence is rebutted " by the very nature of the transaction between C. H. " Smith and Doble". Without going farther into the evidence in this case it becomes perfectly apparent from the brief of plaintiff in error that he is asking this Court *to sit as a jury* and determine the *weight* of evidence. His argument admits that there was evidence to sustain the decision of the Court, but that such evidence should be disregarded.

The jury phase of this argument is again illustrated by the fact that plaintiff in error devotes pages of his brief to attacking the written assignment made by J. W. Smith to his son Charles Smith. Plaintiff in error gives much attention to the confidential relation

existing between the parties, and argues that the proof of gift must be stronger where a confidential relation exists than otherwise. In this argument counsel admits that there was some proof of a gift but by reason of the confidential relation it was not sufficient. This was a matter wholly for the lower Court to consider, and that the lower Court did consider it is apparent from the opinion, where the Court said:

" Returning now to the testimony of the witnesses " Doble, King, Palmantier and Thomas: This tes- " timony is clear and positive that J. W. Smith in- " tended to distribute his property to his children, and " did so as to the real estate; that he intended to give " the railroad bonds to his son, and the testimony is " reasonably certain that he did so. These witnesses " are all gentlemen of character, and their testimony " has not been impeached or discredited in any way. " This evidence cannot be rejected; and, giving it the " consideration it is entitled to receive, the Court " arrives at the conclusion that the plaintiff has, under " the law relating to gifts of property, established his " ownership of the bonds and his right to recover pos- " session thereof."

If we were to argue this matter to this Court sitting as a jury we would call your attention to the testimony of Charles Smith, on page 129 of the transcript, where he says: "He was particularly desirous of avoiding " litigation and having everything fixed before he " passed away and in connection with the bonds, I

" spoke to him about this bill of sale, and he said,
" ' Charlie, I'll fix a better way than that', or something
" ' or other, I don't know just what; 'I will tell Mr. Pal-
" ' mantier, Mr. King and Mr. Doble what disposition I
" ' have made of these bonds, and I will direct Mr. Doble
" to give you these bonds. I want you to go over and
" have Mr. Doble come here to my room so that I can
" tell him that I have given you these bonds". On page 130 the plaintiff testified that "Mr. Doble came in
" response to the request of his father, that he left them
" alone together and went for a walk, that his father
" told him afterwards 'I have GIVEN MR. DOBLE an
" 'ORDER TO DELIVER YOU these bonds, and told him
" 'that they belonged to you. That I had given them
" 'to you'."

We would call the Court's attention to the fact that the statements made to Mr. Palmantier, to Mr. King, to Mr. Thomas and to Mr. Doble were made in the absence of Charles H. Smith and some of them during his absence in Denver, and when Mr. J. W. Smith could not have been under influence of his son. We would farther call your attention to the testimony of Mr. Doble on pages 67–68 and 69 of the transcript. The testimony of Mr. Palmantier on page 72 and page 77 and the testimony of Mr. Thomas, pages 80 and 81, and page 117 where THE PLAINTIFF IN ERROR testified positively that Mr. Smith, deceased "had stated to him
" that he had given the bonds to his son", and if we were arguing this to a jury we would answer the argu-

ment of plaintiff in error relative to the mental condition of the deceased by showing that Mr. Thomas testified on page 80, after speaking of his long acquaintance with deceased, "He was in my opinion sane". Page 84, "I think I saw him last the day before his " death, and also probably a day or two before that. " My recollection is that I was there about every other " day". And the testimony of the PLAINTIFF IN ERROR was, "The last time I had any conversation with him " he talked with me rationally, the same as he always " did. He never at any time before his death talked " to me in an irrational manner. For three or four " days before his death he did not seem to want to talk " to anyone, and I did not bother him. He was of " sound mind. I could not see *that he was of unsound* " *mind at all.*"

From all the testimony there can be no doubt that the deceased told Mr. Doble that he had given the bonds to his son and ordered and directed him to deliver them. This verbal order ACTED ON IN THE LIFETIME OF DECEDENT was as good as a written one. There can be no doubt that Mr. Smith died in the belief that he had given the bonds to Charles H. Smith.

As to the cases cited by plaintiff in error none of them are applicable because the intent of testator manifested in August, 1875, was carried into effect by an actual and symbolic delivery during lifetime of decedent.

We submit that no stronger proof than the argument and brief of the plaintiff in error can be presented to show that the writ of error is not taken out in good faith. The whole brief is but an appeal to this Court to do what every lawyer knows it cannot do—sit as a jury—and review the evidence. We insist that this appeal is frivolous, and that the judgment should be dismissed with damages as required by the Act of Congress. Counsel also must have known that the record did not present any question of law he desired to argue, for the conclusion of law and the judgment irresistibly follow from the facts found.

If Charles Smith was the owner of the bonds deposited with the Safe Deposit Company as his bailee, and by reason of the interference and claim of King, administrator, such bonds were withheld from Smith, as found by the special findings at p. 18 of the Record, why was not the judgment warranted by such special findings?

Dated June 15, 1901.

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